SUPREME COURT OF THE UNITED STATES.

No. 155.

JOHN D. BUSH, APPELLANT,

vs.

JACOB MARSHALL AND WM. B. WHITESIDES.

APPEAL FROM THE SUPREME COURT OF IOWA TERRITORY.

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J. & G. S. GIDEON, printers.

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

Pleas held before the honorable Charles Mason, chief justice, and Joseph Williams and Thomas S. Wilson, associate justices, of the supreme court in and for Iowa Territory, at Iowa city, on the 4th day of January, A. D. 1844.

JACOB MARSHALL & WILLIAM B. WHITESIDES, complainants, against JOHN D. BUSH, defendant. } In chancery.

An appeal from the district court of Dubuque county.

Be it remembered, that heretofore, to wit, on the 9th day of January, A. D. 1843, the said defendant, by his solicitor, filed in the clerk's office of the supreme court in and for the Territory aforesaid, the following transcript of the record and proceedings had in the district court of Dubuque county, in the above entitled cause, to wit:

Transcript.

Pleas before the honorable Thomas S. Wilson, judge of the third judicial district of Iowa Territory, and presiding judge of the dis-
[SEAL.] trict court of Dubuque county, begun and held at the February term, A. D. 1842.

Witness: THOMAS S. WILSON, *Judge.*
" PHILIP S. DADE, *Clerk.*
" GEORGE W. CUMMINGS, *Sheriff.*

TERRITORY OF IOWA, *Dubuque county, ss:*

Be it remembered, that on the 20th day of April, A. D. 1840, Jacob Marshall and William B. Whitesides, by Davis & Crawford, their attorneys, filed in the clerk['s] office of the district court of Dubuque county (on the chancery side of said court) their bill in chancery, in the words and figures following, to wit:

Bill in chancery.

To the *honorable* the judge of the district court in and for the county of Dubuque, in the Territory of Iowa, in chancery sitting.

Humbly complaining sheweth unto your honor your orators William B. Whitesides and Jacob Marshall, of Galena, in the State of Illinois, that heretofore, to wit, on the 8th day of February, 1839, they sold to John D. Busch, of the town of Dubuque, in the Territory of Iowa, whom they pray may be made defendant to this bill, two certain town lots in the town of Dubuque aforesaid, numbered on the Government plat of said town as lots No. 7 and 194, and described in the conveyance of said lots to said Bush, as "the lot at present occupied by William Hale as a tavern, on the northeast side of Main street, and fronting on

said street sixty-four feet, and running back the same width to an alley one hundred and thirteen feet; also the lot immediately opposite to it, fronting on Water street sixty-four feet, and running back one hundred and thirteen feet *back* to the alley which separates it from the lot above described, for the price and sum of three thousand dollars; one half of which the said John D. paid down at the time of said sale; for the remainder, he included the same in a note he gave to the said Jacob for the sum of seventeen hundred and ninety dollars, payable on or before the first day of October next after said sale; and for the better securing the payment of the same, the said John D. executed to your orator, William B. Whitesides, a deed of mortgage, conveying to the said William B. the same two lots in full property; condition[ed] that if the said John D. should pay the said sum of fifteen hundred dollars, part of the said note of seventeen hundred and ninety dollars, according to the tenor and effect thereof, then said deed of mortgage to be null and void, else to remain in full force and effect, and which deed of mortgage bears date the 8th day of February, 1839; all of which by said deed and note, copies of which are hereto annexed and prayed to be taken as part of this bill, reference being thereto had, will more fully appear.

Your orators further shew unto your honor, that they have frequently applied to the said John D. for the payment of the said sum of fifteen hundred part of the said note, and requested him to pay the same, which he has wholly and entirely failed and refused to do; and that the same now remains wholly due and unpaid, the said John D. pretending that he is under no legal equitable obligation to pay said sum of fifteen hundred dollars, and that said lots are in no way embarrassed or encumbered by said deed of mortgage, or liable to the payment of said sum of fifteen hundred dollars, or that the same is in any way a charge upon them; all of which actings, pretences, and doings, of the said John D. are contrary to equity and good conscience, and tend to the manifest injury and wrong of your orators; and inasmuch as your orators are wholly remediless by the strict rules of the common law, and only relievable in a court of equity where matters of this kind are properly cognizable and relievable; to the end, therefore, that the said John D. may full, true, and perfect answers make to all and singular the matters and things herein contained, as fully and particularly as if the same were again herein repeated, and he thereto particularly interrogated, and more especially that he may answer and state whether he did not purchase the said two lots of your orators, or one of them, as herein before stated and set forth, and for the price as herein before stated; if not, at what price, and for what consideration; whether he did not give his note to your orator, Jacob Marshall, as herein before stated, for the sum of seventeen hundred and ninety dollars, payable on or before the first of October next after the date of said note, and whether fifteen hundred dollars, part of the consideration for the purchase of said two lots, was not embraced in said note; whether he did not execute to your orator, Wm. B. Whitesides, the deed of mortgage as herein before stated and set forth, and for the consideration stated; if not, what was the consideration for the same. And that

it may please your honor, by a decree of your honorable court, to foreclose the equity of redemption of the said John D. to the two lots aforesaid, and that they may be sold to pay to your the sum of fifteen hundred dollars aforesaid, with the interest which has accrued thereon, may it please your honor to grant to your orators the writ of subpœna, &c., commanding the said John D. to be and appear, &c., and to grant to your orators such other and further relief as to equity may appertain, and to your honor may seem meet; and your orators, as in duty bound, will ever pray, &c.

DAVIS & CRAWFORD,
Solicitors for complainants.

(*Copy of note.*)—Note.

On or before the first of October next, I promise to pay to Jacob Marshall, or order, the sum of seventeen hundred and ninety dollars, for value received.

February 8th, 1839. J. D. BUSCH.
$1,790 00

Mortgage.

This indenture, entered into this 8th day of February, 1839, by and between John D. Bush, of Dubuque county, of the one part, and William B. Whitesides, of Galena, Illinois, of the other part, witnesseth: that the said John D., for and in consideration of the sum of fifteen hundred dollars to him in hand paid, the receipt of which is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, release, and convey, to the said William B. Whitesides, the following two described lots, situate in the town of Dubuque aforesaid, to wit: the lot at presents occupied by William Hale as a tavern, on the north side of Main street, and fronting on said street sixty-four feet, and running back the same width to an alley one hundred and thirty feet; also, the lot immediately opposite to it, fronting on Water street sixty-four feet, and running back one hundred and thirteen feet to the alley, which separates it from the lot first above described: to have and to hold the before described town lots with buildings and improvements thereon, and all the privileges to them belonging, or in any wise appertaining, to him, the said William B., his heirs and assigns for ever, subject nevertheless to the following express condition, to wit: whereas, the said John D. has this day become the purchaser from the said William B. of the two above described lots, and taken his deed for the same, bearing even date herewith, and given his promissory note of the like date for the sum of seventeen hundred and ninety dollars, ($1,790,) payable on or before the first day of October next, of which fifteen hundred dollars is part of the consideration for the purchase of said lots. Now, if the said John D. shall well and truly pay, or cause to be paid, the fifteen hundred dollars aforesaid of said note, according to the tenor and effect thereof, then this conveyance to [be] utterly null and void, else to remain in full force and effect.

In witness whereof, the said John D. Bush hath hereunto set his hand and seal, the date first above written.

Signed. JOHN D. BUSH. [SEAL]

Witness:
TIMOTHY DAVIS,
WARNER LEWIS.

On the back of which bill is the following endorsement, to wit:

Precipie.

The clerk will please issue a subpœna, &c., in chancery, according to law.

Whereupon the said clerk issued a subpœna, as follows, to wit:

Subpœna in chancery.

TERRITORY OF IOWA, *Dubuque county, ss:*

To the sheriff of said county, greeting:

In the name of the United States of America, you are hereby commanded to summon John D. Bush, if to be found within your county, to be and appear before the district court in and for the county and Territory aforesaid, on the first day of the next term thereof, to be holden in the town of Dubuque, in and for said county, on the first Monday in May, 1841, to answer the matters and things contained in a certain bill of complaint exhibited against him by Jacob Marshall and William B. Whitesides, in our said court, on the chancery side thereof, and further to hear and receive whatever the said court may then and there consider in this behalf, &c. Hereof fail not, and of this writ and your service make due return to our said court, on the first day of the next term thereof.

[L. S.] Witness the hon. Thomas S. Wilson, judge of our said court, at Dubuque, this 20th day of April, A. D. 1841.

PHILIP S. DADE, *Clerk D. C.*

On the back of which said subpœna is the following endorsement of service made by the said sheriff, to wit:

Sheriff's return.

Served, by delivering an attested copy of this writ to John D. Bush, the within named defendant, this 20th day of April, A. D. 1841.

Service and mileage, $1 58.

GEORGE W. CUMMINS, *Sheriff D. Co.*

And at another day, to wit, on the 4th day of May, A. D. 1841, the respondent, by J. V. Berry, his solicitor, filed his answer to the complainants' bill of complaint, in the words and figures following, viz:

Answer of respondent.

TERRITORY OF IOWA, *county of Dubuque, ss:*

District court to May term, A. D. 1841. In chancery.

The answer of John D. Bush, of the town of Dubuque, I. T., to the bill of complaint of William B. Whitesides and Jacob Marshall, of Galena, State of Illinois.

The defendant, now and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception that can or may be taken to the many errors, uncertainties, insufficiencies, and other imperfections in the said complainant's said [bill] of complaint contained, for answer thereunto, or unto so much thereof as this defendant is advised is in any wise material or necessary for him to make answer unto, answereth and saith, that he admits that the said complainants sold him the town lots in their bill of complaint mentioned, and for the sum as stated in their bill of complaint, and also gave his note and mortgage, as stated in their bill of complaint.

And this defendant further answering says, that before and at the time of the sale of said lots, they, the said complainants, represented to this defendant, that they, said complainants, had and held a perfect and indisputable pre-emption right to said lots by virtue of certain laws of the United States in relation to town lots in the town of Dubuque, Burlington, &c., and that all that this defendant had to do, to complete his title to the same, would be to go to the land office at Dubuque, and enter the same, by paying the minimum price fixed by the laws of the United States in relation to town lots in the town of Dubuque.

And this defendant further answering says, that at the time of the purchase of said lots, as stated in the complainants' bill of complaint, they, the said complainants, well knew that they did not have a pre-emption right to said lots by virtue of any law of the United States, or by the proceedings had under and by virtue of any law of the United States giving them a pre-emption to the same.

And this defendant further answering says, that such false, fraudulent, and deceptive representations as to the pre-emption rights of the complainants, made by said complainants to said defendant before the sale and purchase aforesaid, induced this defendant to purchase the same, and to pay and obligate himself to pay so large a sum of money to said complainants for said lots, as they in their bill of complaint have stated.

And this defendant further answering says, that if the said complainants had not fully assured him that *the* held a perfect pre-emption right to said lots, he would never have purchased the same, for he says their pre-emption right was all essential to the ultimate completion of the title, and therefore constituted the principle and main consideration to this defendant in entering into such a contract, as the complainants, in their bill of complaint, have alleged.

And this defendant further answering says, that in consequence of the said complainants not *have* a pre-emption right to the same, as *the* represented and sold to him, he has been greatly injured, damaged, and defrauded, and was wholly unable to sell or dispose of the same, which he might have done had the said complainants' pre-emption right been good, and as they sold and represented them to be at the time of the sale, in their bill of complaint mentioned.

And this defendant further answering says, that at the time of the sale aforesaid, they, the said complainants, represented unto this defendant that they were the owners of the fixtures in the tavern which was situated

on one of the said lots, to wit: the bar, shelves, and counter, and the said complainants sold the same to this defendant, and the same constituted and formed a part of the property sold, for which the sum, stated in the said complainants' bill of complaint was to be paid.

And this defendant further answering says, that said fixtures were not the property of the said complainants, and they had no right to sell the same, but as this defendant has been informed and believes true, were actually the property of one William Hale, and were taken away and removed from said premises by said Hale, as his property, after the sale of said premises to this defendant.

And this defendant further answering says, that by reason of the moving and tearing away of said fixtures, the house and tavern situate upon one of said lots was greatly injured and damaged, and this defendant was, by means thereof, prevented from leasing or letting the same, as he otherwise might have done, and thereby he sustained damage to the amount of between three and four hundred dollars.

And this defendant further answering says, that he was also induced by the false and fraudulent representations of the complainants, that William Hale, who was a tenant to the said complainants for a certain unexpired term at the time of the sale, was punctual in the payments of the rent, and would pay the same at the end of every month, to give his note for the sum of two hundred and ninety dollars for the rent for said unexpired time.

And this defendant further answering says, that the said William Hale was not punctual, nor never had been so, in the payment of the rent, before nor since the sale; and this was known to the said complainants.

And this defendant further answering says, that he never has been able to collect any of the said rent from the said William Hale, and that the said sum of two hundred and ninety dollars still remains due and unpaid.

And this defendant further answering says, that when he gave his note for the sum of two hundred and ninety dollars, it was done to accommidate the complainants, and by reason of the fraudulent representations of the ability and willingness on the part of said Hale to pay.

And this defendant further answering says, on or about the 21st day of September, A. D. 1840, said lots were put up at public auction, by and under the laws of the United States, at the land office in the town of Dubuque, and offered for sale as other town lots of the town of Dubuque, and one of the said town lots sold by the complainants to this defendant was put up and sold, and struck off to this defendant as the highest bidder, for which he paid the United States the sum of nineteen dollars and forty-two cents, and for which he now holds the title from the United States, as far as the same could be completed by and under the present existing laws of the United States in relation to town lots.

And this defendant further says, that his bid upon said lot *lot* at the public land sales was not done to defraud or wrong the complainants, but was done to protect himself in procuring a title, which the complainants were entirely unable to give him, and which was liable to be sacrificed to any person who chose to bid upon the same.

And this defendant further answering says, that William B. Whitesides, one of the said complainants, executed to him, at the time of the sale of said town lots, a warrantee deed for the same, and that the title of one of said lots is still in said Whitesides, under the laws of the United States.

And this defendant further answering says, that the title to one of said town lots has entirely failed on the part of said complainants, and been placed beyond the reach of ever enabling said complainants to execute and make to this defendant a good title to the same, and that this has been done without any fraud or connivance on the part of this defendant, and in express opposition to the wishes of this defendant.

And this defendant further answering says, that the inability of said complainants, or either of them, to give him a good title for one of said town lots, was occasioned, as he verily and honestly believes, in an attempt on the part of the complainants to defraud your defendant out of the same.

And this defendant further answering says, that the money which has been already paid, and which was paid at the time of the sale and purchase aforesaid, was more that said property was worth, as the title of said complainants has proved since the sale aforesaid.

And this defendant further answering says, that he has paid upon the fifteen hundred dollars, since the execution of said note, the sum of three hundred and seventy dollars, and that that sum is to be credited upon the sum of fifteen hundred dollars, for which the mortgage was given.

And this defendant further answering says, that he is perfectly willing that the said complainants should take the property in return, by paying him back the same sum of money which he has already paid for the same, and that he hereby offers to do the same; all which matters and things this defendant is ready and willing to verify, maintain, and prove, as this hon. court shall direct, and hereby prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN D. BUSH.
JOHN V. BERRY,
Solicitor, and of counsel for def't.

Affidavit.

TERRITORY OF IOWA, *county of Dubuque, ss:*

John D. Bush, being duly sworn, says, that he has heard the answer read, and says the same is true, of his own knowlege, except as to those facts stated to be upon his information and belief; and, as to those facts, he believes them to be true.

JOHN D. BUSH.

Sworn and subscribed to, this 6th day of August, 1841, before me.
PHIL. S. DADE, *Clk D. C.*

And at another day, to wit, on the 12th day of August, 1841, the following replication was filed, to wit:

Replication.

The replication of Jacob Marshall and William B. Whitesides to the answer of John D. Bush, defendant.

The complainants, reserving and saving to themselves all and all manner of advantage of exceptions to the manifold insufficiencies of the said answer, for replication thereunto saith, that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants: without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and , traversed or denied, is true; all which matters and things these repliants are, and will be, ready to aver and prove, as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

DAVIS & CRAWFORD,
Sol's for complainants.

Statement of facts agreed upon.

MARSHALL & WHITESIDES vs. JOHN D. BUSH. } Bill to foreclose mortgage.

Same Defendant vs. Same Complainants. } Petition in chancery and injunction.

It is agreed the following statement of facts may be used in the same manner as if the same were proved by witnesses on the hearing of the above causes:

1st. That the lots mentioned in the foregoing pleadings were sold at a public sale of lots in the town of Dubuque, by the United States, in last, at which sale, John D. Bush, abovenamed, became the purchaser of lot No. , and the abovenamed Wm. B. Whitesides of lot No.

2d. That said lots would not have been put up and sold at said sale, unless the said William B. Whitesides had relinquished all claim to the same to the United States previous to said sale; and that said Whiteside did thus relinquish, previous to the same being put up to sale, and for the express purpose of having them sold at said sale.

3d. That said Bush objected and protested to said Whiteside against the said Whiteside thus relinquishing.

4th. That previous to said sale, and at the time of said relinquishment, and subsequent thereto, (but previous to the sale,) said Bush was informed by E. C. Daughety and Whiteside, and by said Whiteside's agent, that his object in having the said lots put up to sale, was expressly with a view that the title to them might be perfected in said Whitesides, so that he could make a good title to said Bush, upon said

Bush paying the purchase money for said lots. And also, that said Whiteside, by himself, or agent duly authorized for said purpose, did propose and offer to said Bush, that if said Bush would bid for said lots, and agree that his purchase should be under the contract for them set out in the pleading in the above causes, said Whitesides would make no opposition to his so doing, but was perfectly willing said Bush should become the purchaser with this understanding; but that said Bush utterly refused so to do; when said Bush was informed by said Whitesides, or by his agent, that said Whitesides would bid for said lots at said sale, in order to enable him to comply with his contract with said Bush. That said Whitesides and Bush were the only bidders for said lots at said sale, and that Philip S. Dade was the bidder for said Whitesides, of which the said Bush, previous to and at the time of said sale, was advised and informed. That the memorandum at the foot of the deed or mortgage, that said Bush was to furnish the money to pay for said lots, was there inserted by the express agreement and understanding of said Bush, at the time of executing said deed and mortgage.

And at the August term of said court, to wit, on the 19th day of August, 1841, the following proceedings were had, to wit:

Referred to special master.

JACOB MARSHALL and WM. B. WHITESIDES vs. JOHN D. BUSH. } In chancery.

And now at this day come the parties, by their solicitors, and on motion it is ordered, that this cause be referred to Philip S. Dade, as special master in chancery, to take the testimony in this cause, and that this cause be continued until the next term of this court.

And at another term of said court, to wit, on the 12th day of February, 1842, the following proceeding were had, to wit:

Decree.

JACOB MARSHALL and WILLIAM B. WHITESIDES vs. JOHN D. BUSH. } Bill in chancery to foreclose mortgage.

And now at this day comes the complainants, by Davis and Crawford, their solicitors, and the respondent, by John V. Berry, his attorney, and the court being ready to decide this cause upon the pleading, exhibits, and testimony produced by the parties, and the solemn argument thereupon had at the last term of this court, does find that the respondent executed his note, and gave his mortgage upon lots No. (7) seven and (194) one hundred and ninety-four, in the city of Dubuque, as designated on the Government plat thereof, for the securing the payment, one thousand five hundred dollars of the principal of said note, as the complainants in their bill of complaint have alleged. And the court doth further find, that no sufficient matter has been shown and sustained by the defendant to exempt said property from the liability of said mort-

gage; and the court doth further find, that of the said note of one thousand seven hundred and ninety dollars, fifteen hundred dollars of which was secured by said deed of mortgage mentioned in the pleadings, there remains due at this time, of principal and interest, the sum of one thousand six hundred and eight dollars and eighty-two cents. The court doth, therefore, order, adjudged, and decreed, that the respondent pay to the said Jacob Marshall, the payee of said note, the said sum of one thousand six hundred and eight dollars and eighty-two cents, with interest thereon at six per cent. per annum until paid, within ten days from the date of this decree, together with the costs of the complainants about their suit in this behalf expended, to be taxed by the clerk of this court. And in default thereof, the court doth hereby order, adjudged, and decree, that the said lots and appurtenances be sold by the sheriff of this county, as lands are sold under execution issuing from the common law side of said court; and that said complainants have execution for the said sum of sixteen hundred and eight dollars and eighty-two cents, and costs of suit in case default be made in the said payment; thereupon the solicitor for the respondent gave notice of an appeal.

And at another day of said term of said court, to wit, on the 17th day of February, 1842, the respondent filed his bond, as follows:

Appeal bond.

Know all men by these presents, that we, John D. Bush, of Dubuque, Iowa Territory, and George Cannon and Francis Gehon, of the same place, are held and firmly bound unto Jacob Marshall and William B. Whiteside, in the penal sum of three thousand dollars, to the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents; as witness our hands and seals, this fourteenth day of February, A. D. 1842.

The condition of this obligation is such, that whereas, Jacob Marshall and William B. Whiteside filed a certain bill of theirs for the foreclosure of a mortgage in the district court of the county of Dubuque, on the equity side of said court, against the said John D. Bush, and the said court having decreed against the said Bush; and whereas, also, the said John D. Bush has appealed from the decree of said court to the supreme court of the territory of Iowa: Now, then, if the said John D. Bush shall prosecute such appeal to effect without delay, and pay to the said Jacob Marshall and William B. Whiteside the amount of said decree, with all costs, interest, and damages, that may arise in the supreme court in consequence of such appeal, in the event that the decree of the district court shall be affirmed, then this obligation to be void, otherwise remain in full force and effect.

JOHN D. BUSH, [SEAL.]
GEO. CANNON, [SEAL.]
FRANCIS GEHON. [SEAL.]

Signed, sealed, and delivered, in the presence of—
Attest: PETER KNOOP,
SAMUEL D. DIXON.

Approved of by order of the court this 17th Feb'y, 1842.
PHIL. S. DADE, *Clerk D. C.*

Costs of dist. court of Dubuque county - - - - $
Costs of transcript, certificate and seal - - -

TERRITORY OF IOWA, *Dubuque county, ss:*

I, Philip S. Dade, clerk of the district court of Dubuque county, do hereby certify that the foregoing is a full, true, and correct copy of all the papers, proceedings, and record, in the above case, wherein Jacob Marshall and William B. Whiteside are complainants, and John D. Bush, respondent, on the chancery side of said court.

In testimony whereof I have hereunto set my hand, and caused the SEAL] seal of said court to be hereunto annexed, this 17th day of June, 1842. PHIL. S. DADE, *Clerk D. C.*

Endorsed: Filed in my office, Jan. 9, 1843.
Teste: GEO. S. HAMPTON, *C. S. C.*

On the same day, to wit, on the 9th day of January, 1843, the following copy of depositions was filed in this cause, to wit:

Depositions.

Jacob Marshall and William B. Whiteside,
vs.
John D. Bush.

District court, Dubuque county, Nov. term, A. D. 1842.—In chancery.

The following depositions, by agreement of parties, were used as testimony in this cause, and are in the words and figures following, to wit:

Deposition of E C. Dougherty.

"John D. Bush vs. Jacob Marshall and Wm. B. Whiteside.

Deposition of E. C. Dougherty, as one of the committee of arrangements for the purchase of lots in the town of Dubuque.—Some time about the 18th of September, A. D. 1840, I called on John D. Bush, and informed him that the committee desired him to make his relinquishment to lot No. seven, (7,) on Main street, in the town of Dubuque, which he positively refused to do, and also replied, that he knew his own business, and would not be dictated to. I informed the committee of Mr. Bush's refusal, when we erased the name of Bush, and inserted the name of Wm. B. Whiteside, and informed Whiteside immediately of the same; when he, the said Whiteside, came before the committee, and made his relinquishment to said lot. We also consulted an attorney on the subject, who stated to the committee that such a course would not injure Bush, but would merely complete the title of Whiteside and Marshall to Bush.

E. C. DOUGHERTY.

Sworn and subscribed to, this 8th day of November, 1841.
BENJ. RUPERT, *J. P.*

Deposition of E. Lockwood.

Deposition of E. Lockwood, one of the committee as above.—I believe the facts set forth in the above deposition by E. C. Dougherty to be correct as far as I am acquainted with the same. Also, that when Whiteside came, we refused to insert the name of Whiteside until we learnt from him that it was his intention by so doing to secure the title in John D Bush; and having advised with counsel, we ascertained that such would be the effect. E. LOCKWOOD."

Sworn and subscribed before me this 8th day of Nov., A. D. 1841.
BENJ. RUPERT, *J. P.*

Deposition of B. R. Petrikin.

TERRITORY OF IOWA, *Dubuque county, ss:*

JOHN D. BUSH,
vs.
JACOB MARSHALL &
WILLIAM B. WHITESIDE. } In chancery.

In the district court of the United States in and for Dubuque county.

Deposition of B. R. Petrikin taken before me, George L. Nightingale, a justice of the peace in and for said county, at my office in the town of Dubuque, on the 26th day of November, A. D. 1841, between the hours of 7 and 8, p. m.

B. R. Petrikin being duly sworn deposeth and sayeth, that he was register in the land office in the town of Dubuque in the month of September, A. D. 1840; that some time in the said month, 1840, the lots in the town of Dubuque were offered at public sale, according to law; that at this time John D. Bush came to the land office and protested against lots No. 7 and No. 194, being offered as aforesaid at public sale; that land officers of this land office had received instructions from the General Land Office, previous to this time, to expose all lots to public sale where the claimants should relinquish their right to pre-emption (under the law laying off the town,) to the United States; that about the same time William B. Whiteside came to the land office and produced the deeds, in relation to the property, before the officers of [the] land office, and the said officers considered that the said William B. Whiteside had a right to relinquish his pre-emption right, and thereupon the said William B. Whiteside did relinquish, under the beforementioned instructions, in consequence of which the said lots, No. 7 and No. 194, were put up at public sale. The effect of a relinquishment under the instructions of the General Land Office, was to do away with all right of pre-emption which the claimant might have to any lots under the law laying off the town; the property, after such relinquishment, is free of all claims and is offered at public sale, and when so offered, any person has a right of bidding thereon.

That they, the said land officers, informed the said William B. Whiteside, previous to his relinquishment, that John D. Bush had been to the

land office, and had protested against the said lots No. 7 and No. 194 being put up at public sale.

That Mr. John D. Bush attended the sale aforesaid, and when lot No. 7 was offered at public sale as aforesaid, he bid it off at something over $100 per acre; that the pre-emption price of said lot, No. 7, under the law, was $40 per acre. That the aforesaid lot, No. 194, was bid off by the public bidder for William B. Whiteside, suppose at the minimum price; that John D. Bush came frequently to the land office previous to the sale, and previous to the relinquishment, to enter the said lots No. 7 and 194, under the pre-emption law, but was not allowed to do so by the land officers, because the proof filed by William B. Whiteside, with the commissioners under the law laying off the town of Dubuque, did not satisfy the land officers as being sufficient to maintain a right under the law in favor of Whiteside's pre-emption.

Interrogatory by the plaintiff's counsel, which is objected to by the defendant's counsel.

After William B. Whiteside had relinquished his pre-emption right to the said lots No. 7 and No. 194, what was his right then worth?

Answer. After the relinquishment, he had no right under the law. That the reason why John D. Bush paid so high a price for lot No. 7, on which he bid at public sale as aforesaid, was, that there were bids against him made by the public bidder—made for William B. Whiteside. The public bidder was a person selected by the claimants to lots in the town of Dubuque, to purchase the lots they claimed, as they were offered at the public sale.

Cross examination.

Interrogatory 1st. Did Whiteside, at the time that he applied to relinquish his claim to the said lots No. 7 and No. 194, state his object in relinquishing? Objected to on the part of the defence.

Answer. His object, so far as I can recollect, [was] to get the title and to convey to Bush, so as to get the balance of the purchase money for the property that was due from Bush to him.

Interrogatory 2nd. Had the commissioners, appointed under the act of Congress laying off the towns of Dubuque, &c., filed in the land office certificates in favor of Whiteside's pre-emption to these lots, No. 7 and No. 194?

Answer. Yes.

B. RUSH PETRIKIN.

TERRITORY OF IOWA, *county of Dubuque, ss:*

I, George L. Nightingale, a justice of the peace in and for the county of Dubuque, do hereby certify that the foregoing deposition of B R. Petrikin was taken, subscribed, and sworn to, before me, at my office in the town of Dubuque, Iowa territory, between the hours of 7 p. m. and 10 p. m. on the 26th Nov'r, 1841.

Given under my hand this 26th Nov'r, A. D. 1841.

GEORGE L. NIGHTINGALE, *J. P.*

Deposition of Charles Corkery.

Charles Corkery being duly sworn deposes and says, that the facts set forth in the foregoing deposition of B. R. Petrikin are substantially true and correct.

Cross examination.

Interrogatory. Did you know of the purchase by Mr. Bush, of the defendants, of the property in controversy; and did Mr. Bush go into possession of the property; and has he continued up to this time in the possession of it?

Answer. The purchase was made by Mr. Bush of the defendants in the winter of 1838 and 1839, and I know that he, Bush, went into the possession of lot No. 7, and has continued in the possession of it up to this time. I know nothing of his going into possession of lot 194.

Interrogatory 2nd. What improvements were on lot No. 7, at the time of the purchase by Bush?

Answer. A house used as a tavern.

Interrogatory 3rd. If, at the time of the purchase, the lots No. 7 and No. 194, were worth $3,000, what was the relative vale of each?

Answer. I would consider lot No. 7 as worth $2,200, and lot No. 194 worth $800. And this deponent further says, that the means he has of knowing that the facts as set forth by B. R. Petrikin are correct, and also by those set forth by him in this deposition, proceed from *his now*, and in September, 1840, [being] a clerk in the land office at Dubuque, Iowa Territory.

Interrogatory by the plaintiff. What improvements were on lot No. 7 at the time of the purchase by Bush of the defendants?

Answer. An old log house and a well.

Interrogatory 2d. What were the bare improvements worth at the time of the purchase?

Answer. I think as good improvements could be made for $400.

Interrogatory 3rd. What was the rent of the property worth at that time?

Answer. $15 per month; but might probably have rented for $20.

CHAS. CORKERY.

Interrogatory 4th. If there had been a pre-emption to lot No. 7 at the time of the purchase, what would it have been worth with the improvements?

Answer. $1,500. Deponent further states, that the said lot No. 7 he would consider worth now $1,200; and that real estate, since the aforesaid purchase by Bush, has depreciated in value in the said town of Dubuque.

CHAS. CORKERY.

TERRITORY OF IOWA, *county of Dubuque, ss:*

I, George L. Nightingale, one of the justices of the peace, in and for said county, do hereby certify, that the foregoing deposition of Charles

Corkery was taken before me at my office, and subscribed and sworn to by the deponent on the 26th day of November, A. D. 1841, between the hours of 7 P. M., and 10 P. M., in the town of Dubuque, Iowa Territory.

Given under my hand, at Dubuque, this 26th Nov'r, A. D. 1841.

GEO. L. NIGHTINGALE, *J. P.*

Deposition of George Cannon.—Deposition of George Cannon.

George Cannon being duly sworn, deposes and says as follows, that he was acquainted with the property in controversy at the time of the purchase by Bush from Whiteside, that is to say, lot No. 7, in the town of Dubuque, and he thinks, at the time of the purchase, said lot was worth $1,500, with the improvements thereon, provided that the pre-emption right had been obtained to it; that he supposes the said property to be worth now $1,300, with no other improvements on it except those that were on it at the time of the purchase, and that all real estate had depreciated in value in the town of Dubuque, Iowa Territory, since the above purchase.

GEORGE CANNON."

TERRITORY OF IOWA, *county of Dubuque, ss:*

I, Geo. L. Nightingale, a justice of the peace in and for said county, do hereby certify, that the foregoing deposition of George Cannon was taken before me at my office, in the town of Dubuque, on the 26th day of Nov'r, A. D. 1841, between the hours of 7 P. M., and 10 P. M., and sworn to before me, and subscribed in my presence.

Given under my hand, at Dubuque, this 26th Nov'r, A. D. 1841.

GEO. L. NIGHTINGALE, *J. P.*

District court of the United States for Dubuque county, Iowa Territory.

JOHN D. BUSH
vs.
JACOB MARSHALL and William B. Whiteside. } In chancery.

Deposition of William Hale.

Deposition of William Hale taken before me, George L. Nightingale, one of the justices of the peace in and for said county, at my office, in the town of Dubuque, between the hours of one and five o'clock of said day.

William Hale being duly sworn, deposes and says as follows, to wit: That there is the sum of two hundred and ninety dollars yet due from me, which accrued under a lease from Jacob Marshall to me, for lot No. 7, in the town of Dubuque, with the appurtenances thereunto belonging, and which has not yet been paid. Mr. John D. Bush had frequently applied to me for the payment of this amount, telling me that Mr. Jacob Marshall was crowding him every day for the money, and that he wanted to collect it—I told him that I had not the money, and could not pay it, but offered to turn out any property I had in payment,

and Mr. Bush said he would see if Mr. Marshall would take property, and that if Marshall was willing he (Bush) was. That the bar fixtures that were in the house on said lot No. 7, at the time of the sale from Jacob Marshall to John D. Bush, belonged to me, and when my lease was out, I took them off. That I consider the fixtures in said house at that time worth the sum of eighty dollars. That the said house upon lot No. 7, in the town of Dubuque, had been generally used as a public house, and was kept as a public house at the time of purchase by Bush from Marshall. That said house would rent more readily for a public house by having a bar in it than it would without; and that while I kept the said house as a public house, the only profit I made was from the bar. That the bar was not included in the lease by me from Marshall. That I was trying to sell such things as I did not want, when I was leaving the house to Mr. Bush, and among other things the bar fixtures, and stoves, and bell, and Mr. Bush told me that he had already bought these articles, that he had bought them when he purchased the house of Marshall. This last statement is on the part of the cross-examination.

Cross examination.

That when I leased the house, I leased the same for a year, at the rate of $70 a month, without the fixtures.

WM. HALE."

TERRITORY OF IOWA, *county of Dubuque, ss:*

I, George L. Nightingale, a justice of the peace in and for said county, do hereby certify, that the foregoing deposition of Wm. Hale was taken, subscribed, and sworn to, before me, at my office, in the town of Dubuque, on the 1st day of December, A. D. 1841, between the hours of 1 and 5 in the afternoon of said day.

Given under my hand at Dubuque this 1st Dec., A. D. 1841.

GEO. L. NIGHTINGALE, *J. P.*

Francis K. O'Ferrall's deposition.

Francis K. O'Ferrall, being duly sworn and examined on the part of the defendants, deposes and says as follows:

Interrogatory 1st. Do you know whether lot No. 7, the lot purchased from William B. Whiteside by John D. Bush, and now in the occupation of said Bush, was improved previous to July, 1836, and whether said Whitesides was in the possession thereof under the original claimants or takers up?

Answer. The said lot was extensively improved, previous to that time, by a building upon it, and the said Whitesides was in the possession thereof under the original takers up; but whether previous to that or not I cannot say.

Cross examination.

Deponent further states, that the improvements on said lot No. 7 was a log house, covering, as he thinks, the entire front, together with two

small back buildings attached to the same house, and occupied as a tavern.

F. K. O'FERRALL.

TERRITORY OF IOWA, *county of Dubuque, ss:*

I, George L. Nightingale, a justice of the peace in and for said county, do hereby certify, that the foregoing deposition of F. K. O'Ferrall was taken, subscribed, and sworn to, before me, at my office, in the town of Dubuque, between the hours of 1 and 5 in the afternoon of said day.

Given under my hand at Dubuque this 1st Dec., A. D. 1841.

GEO. L. NIGHTINGALE, *J. P.*

Timothy Davis' deposition.

Timothy Davis, being duly sworn, deposes and says, on the part of the defence, that he drew the writings between the parties at the time of the sale and purchase of this lot, (No. 7,) and that he drew the memorandum at the foot of the deed; that Mr. Bush was to advance the money to pay for said lots whenever they could be entered, which amount of money was to be the pre-emption price of the lots; and that at the time of this sale Mr. Whiteside told him, Bush, that he, Whiteside, had a pre-emption to the property; that, a short time previous to the public sale of lots in the town of Dubuque, he went to Mr. Bush, as the agent and attorney of Whiteside and Marshall, and informed Mr. Bush that they would make no opposition to his bidding in said lots, if it was understood that he would do it under the contract with them for the purchase of said lots. Mr. Bush declined so to do; and he then informed Mr. Bush that they would buy said lots in themselves.

The sale alluded to is the one at which lot No. 7 was put up at public sale.

And said Timothy Davis, being cross examined, further states, that Whiteside & Marshall sold said Bush the two lots, No. 7 and No. 194, representing that W. B. Whiteside had a pre-emption right to them.

"TIMOTHY DAVIS."

TERRITORY OF IOWA, *county of Dubuque:*

I, Geo. L. Nightingale, a justice of the peace in and for said county, do hereby certify, that the foregoing deposition of Timothy Davis was taken, subscribed, and sworn to, before me, at my office, in the town of Dubuque, on the 1st day of December, A. D. 1841, between the hours of 2 and 5 o'clock in the afternoon of said day.

Given under my hand at Dubuque this 1st Dec., A. D. 1841.

GEO. L. NIGHTINGALE, *J. P.*

TERRITORY OF IOWA, *Dubuque county, ss:*

I, Warner Lewis, clerk of the district court of the county of Dubuque and Territory aforesaid, do hereby certify that the foregoing is a true, full, and correct copy of the testimony which was agreed by the parties to be used as evidence, and was used as such, in the foregoing cause,

wherein Jacob Marshall and William B. Whitesides are plaintiffs, and John D. Bush is defendant.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of said court, at Dubuque, this 26th day of December, A. D. 1842.

WARNER LEWIS, *Clk D. C.*

(Endorsed.)—Filed in my office Jan'ry 9, 1843.

Teste: GEO. S. HAMPTON, *C. S. C.*

And on the same day, to wit, on the 9th day of January, A. D. 1843, the said defendant, John D. Bush, filed, by his solicitor, his assignment of errors herein, which are in the following words and figures, to wit:

Assignment of errors.

JOHN D. BUSH, appellant,
ads.
WILLIAM B. WHITESIDES & JACOB MARSHALL, appellees.

SUPREME COURT, IOWA TERRITORY, *January term*, 1843.—Appeal from district court, Dubuque county, Iowa.

Afterwards, to wit, on the first Monday of January, in the year of our Lord one thousand eight hundred and forty-three, in this same term, before the judges of the supreme court aforesaid, at the capitol in Iowa city, in the territory of Iowa, comes the said John D. Bush, by John V. Berry his attorney and solicitor, and says, that in the record and proceedings aforesaid, and also in giving of the decree or judgment aforesaid, there is manifest error in this, to wit: that Whitesides and Marshall have no equitable rights, calling for the intervention of the equitable powers of a court of equity for rendering such a decree, and should therefore be reversed.

First. Because they relinquished their pre-emption right, which they had sold to Bush, to the United States without the consent of Bush and against his express wishes, and permitted the property to be put up at public auction at the land office at Dubuque, to be bid off by the highest bidder.

Second. Because Bush attended the public land sale and bid off one of the lots mortgaged and procured the certificate from the land office, according to the laws of the U. S., without any fraud or connivance on his part.

Third. Because Bush, from the situation in which the relinquishment had placed him, by jeopardizing his right, was compelled to bid for the purpose of protecting those rights against other bidders.

Fourth. Because Bush had the same right to appear and bid, at the public land sale, as any other citizen of the U. S., and the title acquired by him did not inure to the benefit of Whitesides and Marshall; because, after their voluntary relinquishment, the relation of trustee between vendor and purchaser did not exist.

Fifth. Because Bush was not bound by any arrangement made be-

tween the relinquishing claimants to town lots in the town of Dubuque, not [to] appear and bid upon the lots offered for sale, at public sale in pursuance of the laws of the U. S.; because, if bound so to do, it would have operated as a fraud against the U. S., and against public policy.

Sixth. Because the complainants in this case show that an agreement was entered into between the claimants to town lots in Dubuque, to which they consented and took a part, which agreement and arrangement was made against the statute of the U. States and public policy, through which they now seek relief.

Seventh. Because the defendants in error have placed it out of their power to make Bush a title to all the property sold to him by their own voluntary act.

Eighth. Because the defendants in error have not offered to convey, by deed, a title to the property to which they acquired a title at the public sale.

Ninth. Because Bush paid, at the time of the purchase, more than the value of the property purchased.

Tenth. Because neither Buck, Whitesides, nor Marshall had, at the time of the sale, what they represented, and therefore the sale was fraudulent and void.

Eleventh. Because, by the relinquishment, they parted as well with their right under the mortgage as any other right.

Twelfth. Because Bush was compelled to pay more than the minimum to the U. S., in consequence of the relinquishment to the U. S.

Thirteenth. Because a deduction ought to have been made for the fixtures, which did not belong to the vendors, and for which Bush agreed to pay, and formed a part of the consideration to the purchase.

There is also error in this, to wit: *This court*, the court below, sitting as a territorial court, has no right to foreclose the equity of redemption and order a sale under a decree by virtue of the laws of the territory, operating and creating a title by virtue of the local laws of the territory in opposition to a title *derived from* the laws of the U. S.

There is also error in this, to wit: The decree and sale under it, originated a title through the territorial laws in opposition to the title acquired under the laws of the U. S., now held by Bush.

There is also error in this, to wit: This court, to wit, district court, has no jurisdiction over cases or a right to interfere in cases where the title to land comes in question, while the *plenum dominium* remains in the U. States, and the title has not passed out of the United States.

Therefore, in all these things there is manifest error, and this he, the said John D. Bush, is ready to verify; wherefore he prays that the judgment or decree aforesaid, for the errors aforesaid, may be revoked, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the judgment aforesaid, &c.

JNO. V. BERRY,
Att'y and solicitor for Bush.

And afterwards, to wit, at a supreme court continued and held at

Iowa city, in and for Iowa territory, on the 17th day of January, A. D. 1843.

Motion to dismiss appeal.

This day came the appellants, by their solicitor, and moved the court to dismiss the appeal herein with damages, for reasons on file.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 9th day of May, 1843.

Motion to dismiss appeal overruled.

This day came the parties aforesaid, by their solicitors, and the court being sufficiently advised of and concerning the complainant's motion to dismiss the appeal herein, overruled the same.

Submitted.

And thereupon, this cause now coming on to be heard, and the court having heard the arguments of counsel, took the same under advisement.

And now at this time, to wit, at a supreme court continued and held as aforesaid, on the 4th day of January, A. D. 1844.

Opinion of the supreme court.

This day came the parties aforesaid, by their solicitors, and this cause now coming on for further hearing, and the court being now sufficiently advised of and concerning the premises, delivered an opinion affirming the decree of the court below, to wit: The petition in this case sets forth the ordinary case for the foreclosure of a mortgage. The answer admits all the material allegations in the petition, but sets up new matter in avoidance. This requires proof. Did this proof fully sustain the allegations in the answer, the defence would be complete; such misrepresentation and fraud are charged in relation to the transaction as, if true, to render the whole invalid.

The first and most material of these allegations is, that the complainants represented to the defendant that they had a perfect pre-emption right to the town lots which are the subject of the mortgage now sought to be foreclosed at the time of the sale and mortgage as set forth in the petition in this case; *and that they well knew at the time that they had no such pre-emption right.*

The proof sustains this allegation so far as concerns the representation aforesaid, but fails to show that they knew the same to be false; so far from this it does not appear but that the statement itself was literally true. It is abundantly proved that one of the complainants had the pre-emption certificates from the commissioners for the lots in question; and, for aught that appears, those certificates were genuine and valid. Their very representations to that effect, when called for as admissions, are legitimate testimony on the subject, sufficient to establish the fact itself, unless disproved.

The only circumstances I recollect tending to disprove that conclu-

sion are, that Whitesides relinquished his certificate, and that Bush was unsuccessful in endeavoring to obtain a title from the land office by virtue of the certificate. These circumstances are by no means conclusive, and hardly sufficient to counterbalance the evidence on the other side, and furnish no proof whatever of a *fraudulent misrepresentation.*

Similar allegations of fraud are also made in relation to the bar fixtures, as well as to the ability and punctuality of Hale in relation to making payments; but these seem wholly unsupported by proof. The charge of fraud is therefore altogether unsustained.

The illegality of the transaction is also relied upon as another ground of defence, but, as it seems to me, without any good reason. This court has often decided that traffic in the public lands, even before the obtaining of a preemption, was contrary neither to the laws nor policy of the General Government; much less can the contract in this case be illegal, which was made in relation to land for which certificates of preemption had previously been issued by commissioners acting by the authority of Congress. There was no contract that the defendant should not bid at the public sale. A third class of objections, set forth in the assignment of errors, refers to a want or failure of consideration for the mortgage in question. It is said that inasmuch as the mortgage was given to secure the purchase-money for the lots sold by complainants to defendant, and inasmuch as the complainants are by their own act made unable to convey one, and the most valuable of those lots, they have no right to the purchase-money remaining now due, we are left much in the dark with regard to the sale from complainants to defendant. It is alleged on the one side, and admitted on the other, that such a transaction took place; but the deed is not exhibited, and we are uninformed as to the real nature of that transaction. Was that instrument a deed of warranty or a mere quit claim; if the latter, the defendant is clearly remediless where there has been no fraud.

But suppose it to have been a deed of warranty, has there been a breach of that warranty? If so, has not such breach resulted from the act of the defendant himself? The defendant has certainly received no detriment from the course events have taken. He has obtained a perfect title by the payment of the purchase-money to the United States, which is exactly what he had contracted for; if he has paid more than the minimum price, the necessity of so doing resulted from his own act; but there is no stipulation that he should only pay the minimum price; had he not interfered in the matter, the complainants would have fulfilled their engagement to him. There were no bidders at the sale but the parties to this suit. It is true the defendant had a perfect right to bid at the public sale; but if by so doing he prevented the complainants from being able to fulfil their contract with him, he has no right to complain, especially as no damage has resulted to him on that account. The case of Hull vs. Cunningham's executors, 1 Mumford's reports, 330, corroborates the position here taken to the fullest extent; in that case A had purchased a tract of land of B, embraced within certain boundaries; contrary to the supposition of both parties, it was afterwards

ascertained that a considerable portion of the tract was not owned by B, but was Government land belonging to the State. A, upon learning this fact, entered the land himself, and then filed his bill for a pro rata reduction of the amount of the purchase-money. The court held that all A had a right to claim was the amount he had advanced for the entering of the land, together with a reasonable compensation for his trouble—a rule which applied to this case would leave the defendant remediless on the point we are now discussing.

As to the relinquishment by Whitesides, in opposition to the wishes of Bush, that is a matter to which no valid objection can be made by the latter. At their own peril the complainants had a right to take that step. Had they failed to secure the property without any interference from Bush, he would then have had his remedy. But in order to be in a condition to take advantage of that measure, he ought not to have been himself the cause of his failure. If the complainants were irresponsible, so that he would have been unsafe in relying upon his remedy over against them, he would have been perfectly right in bidding at the sale, or taking any other step proper for securing his own interest, but the most he could claim against the complainants in such a case would be a compensation for the expense to which he had been subjected by their relinquishment, which, in the present case, is just nothing at all.

The counsel for the defendant treats this case as though it were a bill filed to enforce a specific performance. Under the old English law and practice, such a view of the matter would have been more correct, but under the law and practice in the United States generally, and particularly in this Territory, the foreclosure of a mortgage is very different from the enforcing of a specific performance. It is a means provided by law for the collection of a debt. The debt is the principal, the mortgage merely the security. The mortgagee does not obtain possession of the property mortgaged, but such property is sold for the purpose of discharging the debt. It is no more the enforcing of a specific performance than is the sale of a house, on a proceeding under the Mechanic's lien law. Much is said of illegal combination, and the countenance which this court may give to it; but these observations seem to me to be founded in but a slight degree upon the evidence in the case. But even if all the facts to which the counsel alludes had been set forth in the evidence, it is doubtful whether it would have made much change in the result; we cannot step out of our legitimate path to punish offences, however much they may be deserving of it. If the complainants have been guilty of an offence, let them be punished according to law; but they are not thereby become outlaws, so that courts of justice are to be closed against them. Their illegal proceedings, if there were any such, have not been connected with, and incorporated into, this transaction, as to render the whole invalid. The deed from the one of the parties, and the mortgage from the other, were legally given, and if there was an illegal combination in relation to the bidding at the public sale, it was wholly inoperative so far as this case is concerned; at all events, it was no part of this transaction.

But it is contended that this court has no right to foreclose this mortgage, inasmuch as it would create a title in opposition to the laws of the United States. If it would have such an effect, the proposition would be evidently correct; but it would have no such effect unless it can be shown that where lands are purchased from the Government, those lands can never afterwards be sold for debt.

Bush mortgaged lands to which he had not a good title; such a title was, however, afterwards obtained. This enures to the benefit of the mortgagee, 1 Powell on Mortgages, 190. Counsel seem to entertain an idea that there is some magic in a title obtained from the United States; such a title is, however, endowed with no peculiar attributes. It is to be considered on the same footing with one obtained from an individual, and treated in the same way. It is just as liable to be sold on execution. If land is mortgaged, and afterwards such a title is obtained, it enures, in equity, to the benefit of the mortgagee, in the same manner. The foreclosure of this mortgage will not be creating a title in opposition to the laws of the United States; it will be merely directing lands to be sold for the purpose of discharging a debt secured by mortgage upon *those* lands which by the general rules of law are made subject to such mortgage.

It is also contended that lands are not subjected to the control of our laws until a patent has issued for the same. I think there is no evidence in this case showing that a patent has not issued, and the party relying upon a fact to support his case, must show that fact. But suppose the patent has not issued, our law makes the receiver's receipt evidence of title; but here again the counsel for the defendant insists that such a law is of no force, and cites the case of Wilcox vs. Jackson, 13 Peters, 498. In that case the decision went no farther than to declare that where a patent has not issued for a part of the public lands, a State has no power to declare any title less than a patent valid *against a claim of the United States to the land, or against a title held under a patent granted by the United States.*

I know of no authority denying to a State or Territory the power of rendering the receipt of the receiver evidence of title, unless the same comes into collision with a patent, or with a claim of the United States. Neither of these are set up in the present instance. Another point made by the appellant in this case is, that there should have been a deduction made for the fixtures that belonged to Hale, but I think this point is unsustained by the testimony. The deed to Bush not being made an exhibit, we are unable to say whether the fixtures were sold to him or not. The party claiming the deduction should have shown affirmatively his right thereto. I think, therefore, the decree of the court below should be affirmed."

It is therefore ordered and decreed, that the decree of the court below be affirmed, and that a writ of procedendo issue to the court below accordingly; and that the defendant pay to the complainants the costs herein expended in this court, and that an execution issue therefor.

Leave to withdraw bonds.

And on motion of the complainants, leave is given them to withdraw the bonds filed in this cause.

And afterwards, to wit, at a supreme court continued and held as aforesaid on the 5th day of January, A. D. 1844.

Notice of defendant's intention to appeal.

This day came the defendant, by his solicitor, and gave notice of his intention of appealing from the decree of this court rendered herein, to the Supreme Court of the United States.

And afterwards, to wit, at the same supreme court, continued and held as aforesaid, on the 10th day of January, A. D. 1844.

Affidavit filed and appeal granted.

This day came the defendant, by his solicitor, and filed herein an affidavit of the said defendant, and on motion of said defendant, an appeal is granted him herein from the judgment of this court to the Supreme Court of the United States, upon said defendant executing bond in the penalty of two hundred dollars, with approved security, conditioned according to law. And thereupon said defendant filed herein a bond, with John V. Berry as security, which bond is approved by the court.

Which affidavit and bond are in the words and figures following, to wit:

Affidavit.

TERRITORY OF IOWA, *ss:*

JOHN D. BUSH, appellant, ads. WILLIAM B. WHITESIDES and Jacob Marshall, appellees. } In equity.

Supreme court, January term, in the year of our Lord one thousand eight hundred and forty-four.

TERRITORY OF IOWA,
County of Johnson, ss:

John D. Bush, the abovenamed appellant, being duly sworn, says, that the amount in controversy between the parties in the above entitled cause, is more, or exceeds the sum of one thousand dollars, exclusive of costs.

JOHN D. BUSH.

Sworn and subscribed to before me this 10th day of January, 1844.
Teste, GEO. S. HAMPTON, *C. S. C. I. T.*

Endorsed: Filed January 10, 1844.
Teste, GEO. S. HAMPTON, *C. S. C.*

Appeal bond.

Know all men by these presents, that we, John D. Bush, of the city of Dubuque, in the Territory of Iowa, and John V. Berry, of the city of Dubuque, in the Territory of Iowa, are held and firmly bound unto